89-170

No. _____

In The

Supreme Court of the United States

October Term, 1989

GEARY ALAN SOSEBEE,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA COURT OF APPEALS

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QUESTIONS PRESENTED

1. Whether the Georgia Child Hearsay Statute, as enacted by the state legislature, and as judicially amended by the Supreme Court of Georgia, is unconstitutional in that it violates a defendant's right to a full and fair opportunity for *effective* cross examination, confrontation and due process?

2. Whether the Georgia Supreme Court violated the "Separation of Powers" doctrine by judicially amending the Georgia Child Hearsay Statute on interlocutory appeal?

3. Whether, assuming arguendo that the Georgia Child Hearsay Statute is constitutional, its implementation in this case violated petitioner's constitutional rights because: (a) the petitioner was not given a fair opportunity to prepare to meet the child's alleged statements introduced through the testimony of third parties since the trial judge refused to give the petitioner access to either the child declarant, her statements or her doctors prior to trial; (b) the petitioner was not allowed through an independent psychiatric and psychological exam to contest the child's competence at the time she allegedly made the statements introduced through the statute; and (c) the petitioner was not allowed a fair opportunity to contest the reliability of the child's statements?

LIST OF THE PARTIES

Apart from the party named in the caption of this petition, the other parties involved in the case were Donald Evans, whose indictment was dismissed, Holly Sosebee, who was the child declarant, and Leslie Sosebee, Mr. Sosebee's ex-wife.

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Petitioner Geary Alan Sosebee respectfully prays that a writ of certiorari issue to review the judgment of the Georgia Court of Appeals entered on February 2, 1989.

OPINIONS BELOW

The opinion of the Georgia Court of Appeals affirming petitioner's conviction appears in the Appendix at page 1a. The order of the Georgia Court of Appeals modifying its original opinion but denying a Rehearing appears in the Appendix at page 7a. The order of the

Georgia Supreme Court denying application for a writ of certiorari appears in the Appendix at page 9a. The order of the Georgia Supreme Court denying motion for rehearing appears in the Appendix at page 11a. The opinion of the Georgia Supreme Court modifying and upholding on interlocutory appeal the Georgia Child Hearsay Statute, reported as *Sosebee v. State*, 257 Ga. 298, 357 SE2d 562 (1987), is reprinted in the Appendix beginning at page 17a.

JURISDICTION

The judgment of the Georgia Court of Appeals was entered on February 2, 1989. A timely petition for rehearing was denied March 14, 1989. The Georgia Supreme Court denied certiorari on April 19, 1989. A timely petition for rehearing was denied on May 3, 1989. This petition for a writ of certiorari was filed within ninety days of that date which includes a thirty day extension granted by this Court on June 19, 1989. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Child Hearsay Statute, Official Code of Georgia Annotated Section 24-3-16:

> A Statement made by a child under the age of 14 years describing any act of sexual contact or physical abuse performed with or on the child by another is admissible in evidence by the testimony of the person or persons to whom made if the child is available to testify in the proceedings and the court finds that the circumstances of the statement provide sufficient indicia of reliability.

Article 1, Section 2, Paragraph 3 of the Georgia Constitution:

> The legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided.

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment to the United States Constitution, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where-in they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Untied States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 9, 1986, Geary Sosebee was indicted in Fayette County for various counts of child sexual abuse. (R-18, 19-23)[1] The charges of abuse stemmed from events that occurred while Mr. Sosebee was involved in a divorce proceeding and an extremely bitter custody battle for his two daughters.

Fayette County Superior Court Judge Andrew Whalen held a two day custody hearing on April 11 and 12, 1986. At the close of the hearing, Judge Whalen indicated that Mr. Sosebee was going to get custody of both children. However, before awarding custody, Judge Whalen ordered Mr. Sosebee and his wife to have psychological evaluations. (T. Vol. VII at 1223-1225) Judge Whalen placed the children with the Fayette County Department of Family and Children Services pending the psychological determinations.

On Monday, April 15, 1986, the Department of Family and Children Services (DFACS) received a telephone call from a person later identified as the children's maternal grandmother, Mrs. Birch. The caller stated that Holly had made statements to her indicating Mr. Sosebee had sexually abused Holly. The caller stated that she had made Mr. Sosebee's wife aware of Holly's complaints. Holly was then interviewed by a DFACS caseworker who informed the Fayette County Sheriff's office that Holly had been abused. Holly was subsequently examined by a therapist, a pediatrician, a midwife, a gynecologist, a caseworker and a juvenile court investigator.

After Mr. Sosebee was indicted, defense counsel timely filed various pre-trial motions requesting that counsel be allowed to interview Holly and that her entire DFACS file and medical records be made available to the defense. (R-58, 77, 42) A competency hearing was also requested. (R-24)

Defense counsel then filed a Motion in Limine requesting that all of Holly's out-of-court statements be excluded because O.C.G.A. Section 24-3-16 (the child hearsay exception) was unconstitutional.

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[1] Citations to "R" refer to the Record of proceedings in the state court. Citations to "T" refer to the transcript of proceedings in the state court. Citations to "a" refer to the Appendix to this petition.

At the hearing on the motion, the prosecutor indicated that he intended to rely on the child hearsay exception, and that he could do so without calling the child as a witness. (Transcript of hearing held 10/16/86 at p. 10).[2] The trial judge, the Honorable Ben J. Miller, denied the Motion in Limine, but granted a Certificate of Immediate Review. (R-89, 90-95)

Defense counsel immediately filed an Application for Discretionary Review which the Georgia Supreme Court granted. (R-96) After a Notice of Appeal was filed (R-98), the trial judge stayed the trial until the constitutionality of O.C.G.A. Section 24-3-16 could be determined by the Georgia Supreme Court. (R-108)

Instead of taking the bull by the horns and deciding the constitutionality of the statute, the Georgia Supreme Court, with Chief Justice Marshall dissenting, sidestepped the issue, deciding only that the defense was not required to bear the "onus" of calling the child victim to the stand. The Supreme Court judicially modified the statute by setting forth a procedure whereby the trial court, rather than the defense, would call the child-victim as a witness if either party requested the court to do so. The Court in its opinion stated: "Our construction of Section 24-3-16 moots the appellant's constitutional arguments." *Sosebee v. State*, 257 Ga. 298, 357 S.E.2d 562 (1987). (Appendix G)

Following the Georgia Supreme Court's decision in June the case was set down for trial September 21, 1987. Immediately prior to trial a motions hearing was held at which defense counsel reiterated many of his previously filed motions. Defense counsel again objected that he had been deprived of any meaningful access to Holly and that he had not been permitted access "to the full medical records, the full DFACS file." (T.Vol.I at 15). Defense counsel had sought such access for almost a year but had been rebuffed by the guardian ad litem who had been appointed by the judge. This appointment had been unsuccessfully challenged through separate legal proceedings. (R-

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[2] This transcript and the transcript of the hearing held 11/12/86 were part of the record in the interlocutory appeal of this case, *Sosebee v. State*, 257 Ga. 298, 357 S.E.2d 562 (1987). They were added as a supplement to the Record in the Court of Appeals on direct appeal.

111, 112-184, 201-214, Transcript of Hearing on 3/24/87) Counsel moved in limine to prevent admission of Holly's testimony since he was not provided access to Holly or the records but the motion was denied. (T.Vol.I at 17)

Defense counsel also sought to exclude any "medical reports, scientific reports or the results of tests or examinations" that were not provided earlier pursuant to petitioner's discovery request. (T.Vol.I at 33). The trial judge appeared ready to grant that motion but backed off when the state objected to the motion with regard to "results of examinations" unless they were exculpatory (T.Vol.I at 34)

Defense counsel then attacked the adequacy of Holly's earlier competency hearing and again requested that Holly be examined by a defense psychiatrist and/or psychologist and that the defense be allowed access to the complete DFACS file and medical records (T.Vol.I at 36-38). These motions were denied. (T.Vol.I at 39)

At the close of the hearing the prosecutor stated that in compliance with his responsibilities under *Brady* he wished to inform the defense that the previous week he had talked to Holly and that she was recanting what she had previously said and what she was now saying was that "it was all a lie, that she made it (allegations of sexual misconduct) up and that she dreamed part of it, and this is allegations that she's made against her father or anybody else." (T.Vol.I at 42) Defense counsel then again requested an independent examination of Holly which was again denied. (T.Vol.I at 43-44)

The evidence showed that on March 6, 1986, Holly had a routine medical exam which failed to indicate any vaginal injury. (T.Vol.V at 834)

Approximately March 20, the divorce action was filed. (T.Vol.VIII at 1452)

Between April 7 and April 12 petitioner's wife, Leslie, had access to Holly and Holly's younger sister.

On April 12 Judge Whalen indicated he was leaning toward granting custody of the children to petitioner and placed the children under the care of DFACS pending his custody order in the divorce proceedings. Angela Stinchcomb was assigned as the children's caseworker. (T.Vol.VIII at 1466-1467)

On April 14, Mrs. Birch, Holly's maternal grandmother, called Ms. Stinchcomb and claimed Holly said a man with a mask got in bed with her (Holly) and made her bottom hurt. (T.Vol.VI at 1029-1030) Ms. Birch told Ms. Stinchcomb she suspected her son-in-law of sexually abusing Holly.

On April 17, Holly was examined by a doctor who detected a vaginal injury. (T.Vol.V at 832) The doctor's testimony indicated Holly's injury appeared to have occurred within the past 7-10 days, but the evidence showed that the petitioner had not had recent access to Holly. (T.Vol.V at 752)

Between April 17th and mid-May petitioner had four or five visits with Holly lasting an hour or less in Ms. Stinchcomb's presence. Soon thereafter his visitation rights were terminated by Ms. Stinchcomb and he was not allowed to visit with Holly again. During the fifteen month period between the termination of petitioner's visitation rights and the trial, Holly's mother and maternal grandparents had regular access to Holly. (T.Vol.V at 741-742, 751-753)

Ms. Stinchcomb was the first to interview Holly about the alleged sexual abuse initially reported by Holly's grandmother. (T.Vol.IX at 1695) Ms. Stinchcomb testified this first interview lasted "a considerable amount of time . . . several hours" (Transcript of Hearing Held on 11/12/86 at 84).

Ms. Stinchcomb did not videotape or audio-tape this or any of the other numerous interviews she had with Holly. (T.Vol.VI at 1075) Ms. Stinchcomb failed to testify at or attend the trial although she was under subpoena by the state and the defense attempted to subpoena her. (T.Vol.III at 276-277) Evidence presented at trial showed Ms. Stinchcomb resigned prior to trial in lieu of being discharged from DFACS (T.Vol.IX at 1631), that she had lied under oath in a pre-trial hearing about her education and credentials (T.Vol.IX at 1654-1661, 1699-1701, 1704-1707, 1718-1720), and that she was a defendant in a criminal case (T.Vol.IX at 1651) and was represented by Ms. Sosebee's divorce attorney in the criminal matter. (T.Vol.IX at 1713-1714)

Ms. Opal McRaney, an investigator and intake officer with the Juvenile Court of Fayette County, was the second official to talk to

Holly about the alleged sexual abuse when she met Holly at DFACS on April 16, 1986. (T.Vol.III at 325) Ms. McRaney testified that in her discussions with Holly, Holly described sexual misconduct and demonstrated what she said with anatomically correct dolls. (T.Vol.III at 392-398) Ms. McRaney did not videotape or audiotape any conversations with Holly (T.Vol.III at 420) and had little formal training in how to non-prejudicially handle interviews with alleged child sex abuse victims. (T.Vol.III at 425-433, 444-445)

Besides her interviews with Ms. Stinchcomb and Ms. McRaney, Holly had numerous examinations by a psychotherapist[3] (T.Vol.IV at 615), a clinical psychologist (T.Vol.VI at 964), a pediatrician (T.Vol.V at 827), a midwife (T.Vol.III at 459-460), and a gynecologist. (T.Vol.III at 485-486) Everyone who talked with Holly was allowed to testify, over petitioner's constant objections, as to what Holly allegedly told them.

According to the people who spoke with Holly, she at first denied her father had done anything of a sexual nature to her and in fact gave statements of affection for her father. Then she began making vague dreamlike statements about monsters and people with masks hurting her. After being unduly influenced by her interviewers and their methods she identified her father as the monster she claimed was abusing her. (T.Vol.III at 412-413, T.Vol.VI at 1024-1025) She also claimed three other men including Donald Evans abused her and that the abuse was videotaped. (T.Vol.III at 403-404) In fact no videotape was ever found (T.Vol.III at 421, 447) and although charges against Evans were brought they were later dismissed. (T.Vol.VI at 1139, 1141) Mr. Evans testified that he was a friend of Holly's father and saw Holly often but that he had never abused her. (T.Vol.VI at 1137-1139)

Testimony from defense witnesses indicated that Holly was an emotionally disturbed child who might be mentally ill. (T.Vol.VI at 1053) She was coy and manipulative and lied. (T.Vol.V at 781-783) On one occasion she even told her therapist that the petitioner had told her she could not tell the therapist something (T.Vol.VI at 1002)

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[3] Holly was seen *46 times* just by Nancy Aldridge, the state's testifying psychotherapist. (T. Vol. IV at 625)

when, in fact, the evidence clearly showed the petitioner had not even seen or spoken with Holly since she began going to the therapist. (T.Vol.V at 755, T.Vol.VI at 1013)

More than a year after she first began describing the alleged abuse under the influence of the people to whom she spoke, she recanted her allegations. (T.Vol.IV at 654) The state attempted to explain this away as part of the child sexual abuse accommodation syndrome. (T.Vol.IV at 663)

The medical evidence showed that in fact Holly's vaginal opening was larger than normal for a girl her age. (T.Vol.III at 462) However, the evidence indicated Holly masturbated a great deal (T.Vol.IV at 690) and inserted pencils and other foreign objects into her vagina which could cause her vaginal area to become red and inflamed (T.Vol.V at 927). The evidence also indicated Holly had bruised her vaginal area when she fell off her bicycle. (T.Vol.V at 935)

The evidence further indicated that Holly had contracted a sexually transmittable disease, hemophilus or vaginitis. (T.Vol.III at 464, 490)

Upon hearing Holly was so infected the petitioner immediately and voluntarily submitted to a battery of tests which confirmed that he did not have any sexual disease including the one somehow transmitted to his daughter. (T.Vol.VII at 1364-1366; T.Vol.VIII at 1484-1485) In fact a medical expert testified that hemophilus is not even always transmitted by sexual contact (T.Vol.VII at 1277-1278)

The petitioner introduced evidence of a penile plethysmography, similar to a blood pressure test, showing he was aroused by adult females but *not* by children. (T.Vol.VIII at 1599-1610) He admitted to having affairs with adult women outside marriage (T.Vol.VIII at 1434) which also was inconsistent with the profile of a pedophile. Mr. Sosebee was put through a standard battery of psychological tests — the Minnesota Multiphasic Personality Inventory, the Rorschach Inkblot Test, the Jackson Personality Test, the Sentence Completion Test, the Draw a Person Test, the Bender Gestalt Tests (T.Vol.VIII at 1549-1563) — the results of which were inconsistent with his being a pedophile or child sexual offender. (T.Vol.VII at 1244-1254; T.Vol.VIII at 1546-1563)

The evidence indicated that Holly was frequently left with babysitters (T.Vol.VI at 1100-1106; T.Vol.VIII at 1409-1410) and on at least two occasions became hysterical when babysitters arrived. (T.Vol.V at 797; T.Vol.VIII at 1496; T.Vol.IX at 1666-1667) Holly had access to the Playboy Channel (T.Vol.III at 445) and her mother engaged in an openly adulterous relationship with another man in Holly's home. (T.Vol.V at 795; T.Vol.VIII at 1436)

The state's expert psychotherapist admitted that false allegations of child molestation frequently arise in bitterly disputed child custody and divorce cases (T.Vol.IV at 702-703; T.Vol.VI at 1032), and that in cases where children make false claims of attribution of sex abuse, particularly arising out of heated custody cases, there are cases where children have actually been molested but name the wrong person or persons (T.Vol.VI at 1044). There was no evidence from Holly's pediatrician during her regular checkups or anyone else of child abuse up to the time of the custody dispute. (T.Vol.IV at 704-710, 715-716)

The jury returned verdicts of guilty on all counts (R-235, 236, 238) and Mr. Sosebee was sentenced to sixty (60) years in the custody of the Attorney General. (R-239, 240, 241) A Motion for New Trial was filed (R-242) and later supplemented. (R-260) The Motion for New Trial was denied (R-303) and a timely Notice of Appeal was filed. (R-1)

The Court of Appeals affirmed the conviction (Appendix A), then modified its decision but denied a rehearing. (Appendix B) Mr. Sosebee's application for a writ of certiorari was denied by the Georgia Supreme Court with one Justice dissenting on April 19, 1989. (Appendix C). The petition for rehearing was denied with another Justice dissenting on May 3, 1989 (Appendix D). A Notice of Intent to seek certiorari to the U.S. Supreme Court was timely filed on May 18, 1989 (Appendix E).

REASONS FOR GRANTING THE WRIT

I. The Georgia Child Hearsay Statute, Both As Originally Enacted by the State Legislature, And as Judicially Amended by the Supreme Court of Georgia on Interlocutory Appeal, Is Unconstitutional.

In *Sosebee v. State*, 257 Ga. 298, 357 S.E.2d 562 (1987), the Georgia Supreme Court attempted to avoid petitioner's arguments attacking the Child Hearsay Statute, OCGA Section 24-3-16, as violating the Sixth Amendment right-to-confront witnesses clause by judicially amending the statute to require an implementing procedure in which the court could make the child available in front of the jury for both the state and defendant "to examine and cross-examine as though the Child Hearsay Statute has not been invoked [by the state]." *Id.* at 299. (Appendix G)

Petitioner contends that even with this new implementation procedure the statute still does not pass constitutional muster.

In the first place the statute continues to deny a defendant state and federal due process by altering the essential fairness of his trial. *Estelle v. Williams*, 425 U.S. 501 (1975). A trial procedure that requires a defendant to request that the court call his accuser as a witness if he wants to question the witness places the defendant in the proverbial Catch-22: have the court call the complainant and be able to question the witness without preparing the witness or, alternatively, decline to call the witness thereby waiving the opportunity for cross-examination. Either way the defendant is placed at a distinct and undue disadvantage. Conversely the prosecution is placed in the unique and substantially advantageous position of being able to, in essence, present its evidence including the hearsay statements of the child, then wait for the defendant to either call the complainant, thereby allowing the state to repeat the hearsay statements, or to not call the witness and fail to controvert the hearsay statements. Nowhere in Anglo-American jurisprudence has an accused ever been required to request that the court call his accuser as a witness in order to enjoy the fundamental right of cross-examination.

Furthermore, even as modified in the Georgia Supreme Court

decision, the statute violates defendant's constitutional rights of face-to-face confrontation and opportunity for *effective* cross-examination.

In *Coy v. Iowa*, 487 U.S. ____, 108 S Ct 2798 (1988), this Court recently held that the Confrontation Clause by its terms provides a criminal defendant the right to confront *face-to-face* the witnesses giving evidence against him at trial. In *Coy* the Court found that appellant's right to face-to-face confrontation was violated by a statutorily sanctioned procedure whereby a screen was used to separate the complaining child witness from the accused during the child's testimony against the accused. The Court rejected the potential "trauma" to the child witness from having to face the accused as insufficient justification for denying face-to-face confrontation:

> [F]ace-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult. It is a truism that constitutional protections have costs.
>
> *Coy v. Iowa*, 108 S Ct at 2802.

The Georgia Child Hearsay Statute violates a defendant's right to face-to-face confrontation in those cases where, as here, neither the state nor the defense calls the child to testify but the child's testimony comes in through a third party. In such a situation the third party effectively becomes the "screen" found objectionable in *Coy*.

In fact the procedural application of the Georgia Child Hearsay Statute is even more constitutionally objectionable than the Iowa screening procedure because at least the screening procedure allowed an opportunity for effective cross-examination. Here, when the complaining child witness is not called by either side, there is simply no opportunity for *any* cross-examination of the child whose statements nevertheless come in through third parties as admissible hearsay.

Ohio v. Roberts, 448 U.S. 56 (1980) teaches that hearsay is admissible only in the case of necessity — usually construed as the unavailability of the witness — and when the hearsay has indicia of reliability. If, however, the witness is available, irrespective of the "indicia of reliability" otherwise present in her statements, there is no necessity requiring admission of the hearsay.

The statute at issue, OCGA Section 24-3-16, specifically requires that "the child is available to testify in the proceedings" before the hearsay is admitted. Thus the statute effectively turns the hearsay rule on its head since it allows hearsay only when there is no necessity for hearsay.

The statute pays lip service to the Confrontation Clause by requiring the child's availability for cross-examination should either party desire to have the court put the child on the stand. However, this case demonstrates the problems inherent in such a twisted statutory scheme. The guardian ad litem claims it is not in the best interests of the child to talk to defense counsel so counsel is unable to interview the witness. Defense counsel is also denied pretrial access to medical records of the child and any other information that might be of importance in preparing to cross-examine the child.

Under the circumstances counsel can either ineffectively cross-examine the complainant or, as in the present case, not cross-examine her at all. Regardless of what choice counsel makes, defendant's Sixth Amendment right to confrontation is violated since he is not given a full and fair opportunity to *effectively* cross-examine the child. *See, e.g. Mattox v. United States*, 156 U.S. 237, 242-243 (1895); *Delaware v. Fensterer*, 474 U.S. 15 (1985).

Certainly there is a compelling state interest to protect children. However, prior to taking the massive step of grossly diminishing, if not suspending, a constitutional right on a compelling state interest there must be evidence that interest outweighs the established constitutional right. Unquestionably in specific cases a compelling state interest will exist to a degree sufficient to create a necessity that requires a diminution of the defendant's right of confrontation. But this necessity must be the equivalent of a witness' unavailability.

This need for *unavailability* before hearsay is admissible in a child sex abuse case was most recently recognized by the Florida Supreme Court in *Perez v. State*, 536 So.2d 206 (Fla. 1988) where it upheld Florida's Child Hearsay Statute, Section 90.803 (23), Fla. Stats. (1985). The Florida statute provides that a statement relating to certain specified sex offenses and made by a child under the age of 11 years is admissible if: (1) the court finds in a hearing that the time,

content, and circumstances of the statement provide sufficient indicia of reliability, and (2) the child either (a) testifies or (b) *is unavailable as a witness*, provided there is other corroborative evidence of the abuse or offense. The Florida statute is totally consistent with *Ohio v. Roberts*, 448 U.S. 56 (1980) whereas the Georgia statute is not since the Florida statute requires *un*availability before admission of the hearsay statements whereas the Georgia statute requires availability which negates the only justification for the admission of the hearsay in the first place. *See also State v. Wright*, 751 S.W.2d 48 (Mo. banc 1988) and *State v. Ryan*, 103 Wash. 2d 165, 171, 691 P.2d 197, 203 (1984) (upholding statutes similar to the Florida statute).

Petitioner further contends that the statute is unconstitutional because it fails to satisfy the second prong of the *Ohio v. Roberts* test, reliability, since the child is not required to undergo cross examination at the time the statement was given. In *California v. Green*, 399 U.S. 149, 157-164 (1970) the Supreme Court found no constitutional violation in the admission of testimony that had been given at a preliminary hearing where the defendant had the opportunity to cross-examine the witness contemporaneously with his statement. The Court in *Green* observed that the preliminary hearing testimony was admissible "wholly apart from the question of whether respondent had an effective opportunity for confrontation at the subsequent trial." The preliminary hearing testimony, the Court explained, had been given under circumstances approximating those at trial: the witness was under oath, the defendant was represented by counsel, and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record.

The Child Hearsay Statute appears in theory to recognize the necessity of complying with the reliability requirement in *Ohio v. Roberts* by requiring a finding by the court that the circumstances of the statement provide sufficient indicia of reliability. However, at least in its application in the present case, the statute is not deemed to require contemporaneous cross-examination for the statement later to be admissible. Petitioner contends that unless there is contemporaneous cross-examination, under *Green* there is not sufficient indicia of reliability for the admission of the statements.

Petitioner also contends the statute is void for vagueness. Nei-

ther the statute nor the Georgia Supreme Court opinion sets forth any criteria for determining how the competence of the declarant or the reliability of her statements is determined. The Statute thus fails to protect a defendant's constitutional rights. *Compare* Section 90.803 (23), Fla.Stats. (1985) which sets forth specific factors to be considered in determining reliability: time, content and circumstances.

Finally, petitioner contends the implementing procedure with which the Georgia Supreme Court amended the statute on interlocutory appeal is unconstitutional in that it violates a defendant's due process rights by allowing a trial judge to bolster the credibility of the child victim by himself calling the child as a witness. Such a procedure, in effect, puts the trial court's seal of approval on the testimony of the child since the Court obviously would not call a witness that it did not believe was telling the truth. *See Miller v. State*, 122 Ga. App. 553, 554, 177 S.E.2d 838 (1970) and cases cited therein. The entire procedure appears to be contrary to O.C.G.A. § 17-8-57 which forbids even an intimation of an opinion by the judge as to matters proved or the guilt of the accused.

II. The Georgia Supreme Court Violated the "Separation of Powers" Doctrine by Judicially Amending the Georgia Child Hearsay Statute on Interlocutory Appeal.

In its original opinion, the Georgia Supreme Court attempted to save the Child Hearsay Statute by amending it as follows:

> We therefore hold that if the prosecution invokes the Child Hearsay Statute to introduce out-of-court declarations by the alleged victim, the court shall do as follows: Before the state rests, the court shall, at the request of either party, cause the alleged victim to take the stand. The court shall then inform the jury that it is the court who has called the child as a witness, and that both parties have the opportunity to examine the child. The court shall then allow both parties to examine and cross-examine the child as though the Child Hearsay Statute has not been invoked. *Sosebee v. State*, 257 Ga at 299. (Appendix G)

Mr. Sosebee contends that the Georgia Supreme Court's amendment of the statute violates the Separation of Powers doctrine and is an unconstitutional usurpation of legislative power by the judiciary.

In *Snelling v. State*, 176 Ga.App. 192, 194, 335 SE2d 475 (1985) the Court of Appeals reiterated the well known rule:

> We are not authorized to impose additional requirements to those delineated by our legislature, which are contained in the Code. Our constitution demands that the legislative and judicial powers shall forever remain separate and distinct. Art.1, Sec. 2, Par. 3. Legislation is the domain of the legislature and *only interpretation* of such codified legislation lies within the province of the courts. *Modern Homes Constr. Co. v. Burke*, 219 Ga. 710, 714-715 (135 SE2d 383); *Pearle Optical v. State Bd of Examiners in Optometry*, 219 Ga. 364, 373 (133 SE2d 374) . . .

Id. at 194 (Emphasis added). *See also Kemp v. Mitchell Co. Demo. Ex. Com.*, 216 Ga. 276, 283, 116 S.E.2d 321 (1960) ("This court has no power to *modify*, amend or repeal a valid constitutional statute enacted by the General Assembly of this State" (emphasis added); *Barnes v. Carter*, 120 Ga. 895, 48 S.E. 387 (1904); *U.S. Life Credit Corporation v. Johnson et al.*, 161 Ga. App. 864, 865, 290 S.E.2d 280 (1982) ("This court cannot add language to a statute by judicial decree").

The Georgia Supreme Court went far beyond its legitimate authority of interpretation when it amended the statute in an attempt to save it from constitutional attack.

If the Georgia Supreme Court believed "judicial surgery" was needed to save the statute,[4] it should have established a procedure for the implementation of the statute that would have protected a defendant's constitutional rights to effective cross-examination, confrontation and due process.

The judicial amendment by the Georgia Supreme Court simply made an unconstitutional statute even less constitutional through unconstitutional means.

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[4] *See Insurance Co. of North America v. Russell*, 246 Ga. 269, 271 S.E.2d 178 (1980).

III. The Georgia Child Hearsay Statute as Implemented in This Case Violated Petitioner's Constitutional Rights to Effective Cross-Examination and Due Process.

a) *No Opportunity for Effective Cross-Examination* — Trial counsel in pre-trial motions (R-58, 77, 42), pre-trial hearings and at trial (T.Vol.I at 15) repeatedly requested that he be allowed to interview Holly Sosebee and examine her medical records.

The prosecutor claimed he had no objection to defense counsel meeting with Holly or her medical experts but was powerless to force DFACS, temporary custodian of the child, to allow the interview or release the records. DFACS claimed the interviews would not be in the best interests of the child. When it later appeared that DFACS, under a federal court consent order formalized in an internal agency letter, would be required to release medical records from the DFACS files, the court *sua sponte* appointed a guardian ad litem for Holly. (Transcript of Hearing on 11/12/86 at p. 99) The guardian ad litem refused to permit the release of the records despite the fact that earlier the DFACS representatives, Mr. Dabbs and Mrs. Wyatt, both stated they were not aware of any information in the medical records "that would be detrimental to the best interest of this child." (Transcript of Hearing on 11/12/86 at pp. 89, 94). Although Mr. Dabbs answered affirmatively when the judge asked him if he felt that releasing the medical records placed the interests of DFACS adversely to that of the child, he could articulate no reason why releasing the records was not in the best interest of the child.

Also instructive is the comment by the trial judge in explaining why he was appointing a guardian ad litem:

> The obligation that I feel *that supersedes every other obligation in this case* is to make sure *the interest of this child* is protected and that nobody play mind games with her, that nobody do anything to her or in her presence that would cause any future detriment to this five-year old child, either physical or mental. That is the way I view my duties. (Transcript of Hearing on 11/12/86 at p.100) (emphasis added)

There was no evidence that Holly would have been harmed in

any way by being interviewed by defense counsel or an independent doctor. She had already been interviewed many times by various doctors and members of the prosecution team. Nor would she have been harmed if defense counsel had been given her medical records and been allowed to speak with her doctors. The DFACS representatives conceded as much. By pledging allegiance to Holly's interests which were never threatened by defense counsel's requests, the rights of the petitioner were trampled underfoot.

The court stated it was powerless to require DFACS or the guardian ad litem to allow petitioner's counsel or other medical experts to interview Holly even if Holly did not object to the interview.[5] The court relied on *Dover v. State*, 250 Ga. 209, 212, 296 S.E.2d 710, *cert. denied* 459 U.S. 1221 (1982) and *Rutledge v. State*, 245 Ga. 768, 267 S.E.2d 199 (1980) to support its decision.

Petitioner submits that *Dover* and *Rutledge* are distinguishable from the present case because they were decided prior to the Child Hearsay Statute. In *Dover* and *Rutledge* the witnesses sought to be interviewed were considered adverse witnesses. Under the Child Hearsay Statute as interpreted in the *Sosebee* decision the child witness may be called through the court as defendant's own witness. In *Wilson v. State*, 93 Ga. App. 229, 91 S.E.2d 201 (1956) the Georgia Court of Appeals held that:

> [A] defendant cannot be required to call a person to the stand *as his own witness* without knowing in advance what his testimony will be . . . Counsel for the defendant not only had the right, but it was his plain duty toward his client to fully investigate the case and to interview any persons who might be able to assist him in ascertaining the truth concerning the event in controversy. *Id.* (Emphasis added.)

As the Georgia Court of Appeals stated in *Cartee v. State*, 85

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[5] It is ironic that only minutes after claiming he had no control over whether the child spoke to defense attorneys the judge asserted his control over the child by transferring custody of Holly from DFACS to a guardian ad litem, thereby preventing the defense from obtaining Holly's medical records which DFACS was prepared to turn over to defense counsel.

Ga. App. 532, 69 S.E.2d 827 (1952):

> An intellectual giant, prescient in and informed upon every abstract principle of law, familiar with every decided case upon the subject is little better than a fool on the trial of a case if he is to be kept in ignorance of the facts of his client's case and denied [access to] witnesses who might substantiate his client's defense. *Id.* at 536.

Even the trial judge in the present case unwittingly agreed with this proposition when he stated:

> It's obvious to me that no attorney that's worth his salt, and I'm sure both of you are, ever put witnesses on a witness stand that you haven't talked to. You have an obligation, obviously Mr. Catts, to interview witnesses for the defense . . . (T.Vol.I at 55)

This Court has repeatedly affirmed that the right of confrontation ensures "an opportunity for *effective* cross-examination." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (emphasis added); *see also Nelson v. O'Neil*, 402 U.S. 622, 629 (1971) (Confrontation Clause does not bar admission of out-of-court statement where defendant has the benefit of full and *effective* cross-examination of [declarant]" (emphasis added); *California v. Green*, 399 U.S. 149, 159 (1970) (introduction of out-of-court statement does not violate Confrontation Clause "as long as the defendant is assured of full and *effective* cross-examination at the time of trial") (emphasis added)

Effectiveness is not measured in terms of the defendant's ultimate success, but rather by the performance of the attorney which must be sufficient to afford "the trier of fact . . . a satisfactory basis for evaluating the truth of the prior statement." *California v. Green*, 399 U.S. at 161. *See also Ohio v. Roberts*, 448 U.S. 56, 73 (1980).

In the present case, without being allowed access to Holly pretrial, petitioner's counsel could not hope to *effectively* cross examine her at trial. Rather than ineffectively examine a critical witness who with one unexpected response could devastate petitioner's case, counsel had no choice but to not examine her at all. This rendered totally illusory the "*opportunity* to examine the child" which the Georgia Supreme Court in *Sosebee v. State*, 257 Ga. 298, 357 S.E.2d 562

(1987) (Appendix G) supposedly guaranteed the petitioner in its construction of the Child Hearsay Statute.[6]

The trial judge here erred when he relied on *Dover* and *Rutledge* to deny access to potentially the most important witness in the entire trial when there was no objective evidence that the witness would have been harmed by talking to petitioner's counsel under the carefully controlled conditions counsel was willing to accept. (T.Vol.III at p.376) As Justice Blackmun recently stated in *Kentucky v. Stincer*, 482 U.S. 730, 738, n.9 (1987), a state rule precluding access to certain information before trial "may hinder [the] defendant's opportunity for *effective* cross examination at trial, and thus . . . may violate the Confrontation Clause." (emphasis in original)

In overruling this enumeration of error on appeal (Appendix A), the Court of Appeals panel misconstrued *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). In *Ritchie* this Court held that full disclosure of a DFACS file was not constitutionally required. The Court's decision was based on the state's compelling interest in protecting its child abuse information. In the present case the DFACS representatives specifically stated that there was nothing in the file the disclosure of which would have been detrimental to the child (Transcript of Hearing on 11/12/86 at pp. 89, 94). Thus here there was no compelling state interest in failing to disclose any or all of the information in the file.

Ritchie is further distinguishable from the present case in that *Ritchie* involved access only to a DFACS file, not, as here, access to a critical witness. Furthermore, Pennsylvania did not have a Child Hearsay Statute similar to Georgia's that allowed the *defendant* to call the alleged child victim.

b) *No Opportunity To Test Competency* — Petitioner filed a Motion For Pre-Trial Hearing to Determine the Competency of Holly Ann Sosebee (R-24) and a Motion to Cause Witnesses to Confer with Defense Counsel. (R-58)

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[6] By failing to allow petitioner's counsel access to complainant and her records the court was in effect making her unavailable to the defense which should have made the Child Hearsay Statute inapplicable.

In the motions hearing immediately prior to trial, counsel renewed these motions requesting that an independent psychiatric and psychological examination of Holly be conducted to determine her competency. (T.Vol.I at 36-38) The motions were denied (T.Vol.I at 39)

It is important to note that the purpose for the requested competency hearing was not to determine Holly's competency just at the time of the trial, but rather her competency at the time she made the hearsay statements later introduced through the Child Hearsay Statute. Furthermore, the basis for the hearing was not just Holly's age, but also her mental condition. There was considerable evidence in the files, particularly from Dr. Kleemeier, indicating that the child was substantially disturbed and perhaps mentally ill. (T.Vol.I at 36)

Shortly after the pre-trial motions were filed but well before the trial the trial judge held a brief competency hearing during which the prosecutor and judge, but not the petitioner, examined Holly. The court ruled that Holly "would be competent to take an oath and testify in a trial in the Superior Court of the State of Georgia." (Transcript of Hearing on 10/16/86 at pp. 2-4).

Petitioner contends that the trial judge erred in allowing Holly's hearsay statements into evidence through the Child Hearsay Statute without determining her competency *at the time she made the statements*. Petitioner also contends that the competency hearing that was conducted was legally inadequate.

In *Westbrook v. State*, 186 Ga. App. 493, 368 S.E.2d 131 (1988), the Georgia Court of Appeals implicitly held that the phrase "available to testify" in the Child Hearsay Statute means *competent* to testify as well as present to testify. *See also Ward v. State*, 186 Ga. App. 503, 368 S.E.2d 139 (1988).

This seems to be the proper interpretation of the statute in view of the *Sosebee* decision wherein the Georgia Supreme Court required that the child be made available in front of the jury for both the state and defendant "to examine and cross-examine *as though the Child Hearsay Statute has not been invoked.*" (emphasis added) On its face this would require that as a threshold matter the child be competent under OCGA Section 24-9-5 which provides:

> Persons who do not have the use of reason, such as idiots, lunatics during lunacy, and children who do not understand the nature of an oath, shall be incompetent witnesses.

In *Westbrook* the defendant called the child as a witness. Here Holly was not called as a witness by either party. However, her statements came in just as if she had testified to them live at the trial except there was no cross-examination.

Petitioner contends that if competency is required for her live testimony competency also must be required for her hearsay statements. Certainly the public policy is the same in both cases — to ensure truthfulness in the evidence. It would be violative of a defendant's due process rights to prevent the admission of live testimony from an incompetent witness while allowing the admission of hearsay evidence from an incompetent witness.

Furthermore, if the declarant was incompetent at the time the hearsay statements were made the hearsay statements would not have the requisite "indicia of reliability" for admissibility under the Child Hearsay Statute.

Only after competency is "thoroughly tested in court" may the trial judge determine competency. *Sullivan v. State*, 162 Ga. App. 297, 291 S.E.2d 127 (1982); *Allen v. State*, 150 Ga. App. 605, 258 S.E.2d 285 (1979).

In a situation where hearsay is admitted the need for thorough testing is even greater since the jury does not have an opportunity to independently determine the declarant's credibility as a matter of fact.

In the present case the court declined to hold a competency hearing to determine whether Holly was competent when she made her statements despite the fact that there was ample evidence that Holly had mental problems and that many of her statements were unconfirmed, contradictory and made under circumstances where she could have been influenced by others. Even the competency hearing that was held did not allow a "thorough testing" of competency. The hearing was woefully inadequate and there was not even any cross-examination by the defense. *Compare Westbrook v. State, supra* (victim subjected to "thorough and sifting" cross-examination by defense

counsel as well as questions propounded by the court and the state's attorney).

Since Holly was not shown to be competent at the time she made her statements, which were admitted as if she had testified to them in open court, petitioner's conviction should be vacated on due process grounds.

c) *No Opportunity to Contest Reliability of Statements* — Under the Child Hearsay Statute in order for the child's hearsay statements to be admissible the court must find that "the circumstances of the statement provide sufficient indicia of reliability." OCGA Section 24-3-16.

In *Dutton v. Evans*, 400 U.S. 74, 88 (1970) this Court stated:

> The indicia of reliability required for admissibility are that the statements be non-narrative; that the declarant is shown by the evidence to know whereof he speaks; that the witness is not apt to be proceeding on faulty recollection; and that the circumstances show that the declarant had no apparent reason to lie to the witness.

In the present case, as trial counsel pointed out in his objections, the court did not give petitioner sufficient opportunity to contest the indicia of reliability of the statements before admitting them. (T.Vol.IV at 591-596) The failure of the court to provide petitioner access to the entire DFACS file and Holly's medical records and statements destroyed his ability to effectively cross-examine the witnesses on the reliability of the statements. Also the court declined to allow the petitioner to call witnesses that could have contested the reliability of the statements before their admission. Thus when the court ruled the statements admissible there had not been a thorough sifting of the evidence to determine whether the circumstances of the statements were in fact reliable.

Even assuming the court used the proper procedures in determining reliability, the court's conclusion of reliability was not supported by the evidence.

First, many of the statements admitted were narrative. Second, the evidence as to whether Holly knew "whereof [she] speaks," was contradictory at best. Many of her statements were not supported by

any evidence and made no sense. She changed her story as time went on and the evidence showed that there were outside sources from which she could have gained her sexual information such as the Playboy Channel and her mother's sexually promiscuous lifestyle. The evidence showed that the people who questioned Holly frequently used suggestive leading questions (T.Vol.VI at 1024) and that her first interview concerning the alleged sex abuse was with Angela Stinchcomb who was shown to have lied under oath about her credentials and who was inadequately trained and biased in favor of petitioner's wife.

Most importantly, the circumstances showed that Holly had a reason to lie to the people to whom she made her statements. Holly was locked in the center of a ferocious custody battle in a bitter divorce between her parents. The first we hear of any alleged sexual abuse is soon after a custody hearing in the divorce proceeding when the judge states he is leaning towards giving Holly's father, the petitioner, custody of the children. Holly is taken away by her mother and maternal grandparents and then within two days her maternal grandmother claims Holly has indicated she was abused. Clearly there was ample opportunity for Holly to have been influenced by her mother's side of the family to lie about her father's involvement in the alleged abuse. Even the state's medical experts conceded that Holly had reason to lie regardless of whether they themselves believed she was lying. (T.Vol.IV at 577-579)

IV. The Georgia Child Hearsay Statute is in Conflict With Child Hearsay Statutes in the Substantial Majority of States Which Have Enacted Such Statutes in that the Georgia Statute Lacks Pre-Trial Notice Requirements that Would Accommodate a Defendant's Right to Prepare his Defense.

In both the statute as written and in its judicially amended form, there is an absence of the following rights to a defendant: (1) Pre-trial notice to a defendant by the state of its intention to use the child's hearsay statements; (2) Pre-trial production by the state to the defendant of a copy of the hearsay statements; (3) Pre-trial notice by the state to the defendant of the person to whom the statements were made; (4) Pre-trial notice by the state to the defendant of the circumstances surrounding the giving of the hearsay statements which provides "sufficient indicia of reliability."

Without the above rights being recognized in the statute itself or in its application as pronounced by the Georgia Supreme Court, a defendant in Georgia is denied the opportunity to *effectively* cross-examine the witnesses to whom the alleged hearsay statements were made as well as the child who allegedly made the statements. Petitioner contends that the hearsay statements of the child, along with the circumstances surrounding the giving of the hearsay statements, be provided to a defendant prior to trial.

The substantial majority of states which have enacted child hearsay statutes have accommodated the right of a defendant to prepare his defense. A substantial majority of the states which have enacted child hearsay statutes provide for the furnishing of the content or substance of the child's statements to defense counsel sufficiently in advance of trial to prepare a defense. Arizona, Arkansas, Florida, Iowa, Indiana, Maryland, Minnesota, Missouri, Oklahoma, South Dakota, Texas, Utah, Virginia, and Washington[7] have tempered the far reaching ramifications of their child hearsay statutes with procedures for the implementation of the statutes which gives a defendant in those states a fair opportunity to defend himself against the charges. These states enable the defendant to prepare pre-trial for the cross-examination of the child declarant as well as for the cross-examination of the third party that testifies to the hearsay statement in court.

This Court should grant certiorari in order to bring Georgia into line with those states set forth above that protect the constitutional rights of their citizens by requiring in their child hearsay statutes that defendants be given copies of the child's statements in advance so that the defendant might have a fair opportunity to defend himself against the charges.

V. The Establishment of Evidentiary Procedures for Protecting Parents in Child Custody Disputes From False Allegations of Child Sexual Abuse is a Matter of Great Concern And Importance to the Public.

There is a growing awareness of the increase in the incidence of false allegations of child sexual abuse, especially in the context of divorce and custody cases, which create strong public policy reasons

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[7] The text of the relevant portions of these statutes are reprinted in Appendix H.

for this Court to grant certiorari in this case and remedy the present diminution of a defendant's right to defend himself against allegations of child sexual abuse.

In *State v. Butler*, 256 Ga. 448, 454 at fn. 4, 349 S.E.2d 684 (1986), Justice Smith in a dissent joined by Justices Weltner and Bell stated:

> We must proceed slowly and carefully in this era of public awareness. We cannot allow our revulsion of sexual abuse or molestation to turn our courts into a forum in which the accusation becomes the conviction and affirmance. According to a recent newspaper article some studies show that there has been an increase in accusations of sexual abuse of children in custody battles. This is an area in which we need to carefully weigh the conflicting findings and studies of the experts before we change the law.
>
> Some experts who delivered papers at the annual meeting of the American Academy of Child and Adolescent Psychiatry asserted that "many social workers and family counselors who interview alleged molestation victims lack adequate training for the task, . . . Too many counselors believe they can determine if molestation occurred by relying solely on how alleged victims play with anatomically correct dolls."
>
> "A study of 15 children who played with such dolls showed 'children with a history of sexual abuse could not be discriminated' from those who weren't molested, wrote Dr. Jonathan Jensen, author of the University of Minnesota study."
>
> *Fathers In Custody Fights Face Sex Abuse Charges*, The Atlanta Journal and Constitution, Oct. 19, 1986.

The South Carolina Child Hearsay Statute reflects these concerns in *prohibiting* child hearsay statements made *in the context of divorce proceedings*: *South Carolina Code Ann.* § 19-1-180 (G) (Lawyers Co-op 1988) (effective June 3, 1988) provides:

> If the parents of the child are separated or divorced, the hearsay statement shall be inadmissible if (1) one of the parents is the alleged perpetrator of the alleged abuse or neglect and (2) the allegation was made after the parties separated or divorced.

Fabrication of a child's statement of sexual abuse by persons who have an interest in prosecuting the defendant have been increasingly recognized in the literature:

> More frequent false allegations of sexual abuse are made by parents during court litigation involving custody and/or visitation. *Benedek and Schetky (1984)* failed to document charges of sexual abuse in 10 of 18 children evaluated during disputes over custody and visitation. This strikingly high (55%) incidence of false allegations is somewhat comparable to this author's documentation of 4 false allegations in 11 children reported to be sexually abused by the noncustodial parent in the context of child custody and visitation disputes (36%).

Green, A. H. (1986), *True And False Allegations Of Sexual Abuse In Child Custody Disputes*, J. Amer. Acad. Child Psychiat., 25, 4:449-456.

According to another article:

> The problem arises during divorce and custody proceedings when a child, for the first time, accuses the parent with whom he/she is *not* residing, of sexual abuse. This raises the possibility that the parent with whom the child is residing has prompted the child to make the accusation of sexual abuse against the alienated spouse and non-custodial parent.
>
> In cases where the initial accusation of sex abuse occurs after parental separation, and refers to a time when the parents were living together, the possibility that the custodial parent has prompted the accusation toward the non-custodial parent must be considered. (emphasis in original)

Kaplan, S. L. & Kaplan, S. J., *The Child's Accusation of Sexual Abuse*

During A Divorce and Custody Struggle, The Hillside Journal of Clinical Psychiatry, 3(1), 81-95 (1981).

Also, according to a recent article published in *Psychiatry Annals*:

> [Children] are also exquisitely sensitive to their parents' emotions, thus setting the stage for an intense, rapidly-oscillating feedback loop that usually operates within the privacy of the family, isolated from outer visibility.
>
> * * *
>
> A child confronted with sequential "evaluations" begins to demonstrate increasing accommodation of memory as well as of affect. In adults, memory function can be said to comprise conviction along with historical verification by retrospection within one's own data bank. Children younger than puberty seem to "remember" differently, using an amalgam of conviction along with verification by "check-in" with an external, trusted ally.
>
> * * *
>
> "Positive" feedback thus operates on both affective and cognitive axes. Both operations stem from children's alliances with, and dependency on, powerful caretakers at times of loss and anxiety. Affectively, they affiliate with a frightened, dependent parent. Cognitively, their perceptions can be "shaped" inadvertently but with exquisite detail by selective, positive reinforcement." (Footnote omitted)

___ Schuman, D. C., *Psychodynamics of Exaggerated Accusations: Positive Feedback In Family Systems*, Psychiatry Annals. 242-247 (April 4, 1987).

The extent of the problem posed by false reports of child abuse by a divorcing spouse are reflected in estimates that 30% of all contested-custody cases in New York involve sex abuse charges. Hopkins, E., *Fathers on Trial*, New York (magazine), 21: 42, 44 (January 11, 1988). Hopkins noted:

> The Brooklyn Society for the Prevention of Cruelty to

Children went even further in its vindication [of a father who was accused of molesting his five-year-old daughter]. It recommended that all charges against the father be dropped and a petition of neglect be filed against the mother.

"For all practical purposes," states the report to the judge, "[The child has] suffered as if [she were an] actual victim of child sexual abuse."

"The real abuse in this case," says Robert Dobrish, [the father's] lawyer, "was the brain-washing done on this child. Imagine what it took to persuade her that her father did these terrible things. [Child abuse] charges are the latest tactic in a nasty divorce. If you wanted to hurt your ex-husband before, what would you say? He has affairs? He cheats on his income tax? He's a homosexual? Big deal. Who even cares about that stuff anymore? But this is the ultimate weapon. I don't care how liberal society gets, it will never be okay to molest your own children."

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Georgia Court of Appeals.

Respectfully submitted,

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APPENDICES

Appendix A

Opinion of Georgia Court of Appeals

In the Court of Appeals of Georgia

77282. SOSEBEE v. THE STATE.

POPE, Judge.

In 1986, defendant Geary Sosebee was a party to a divorce proceeding and custody dispute regarding his two children. The court, in the divorce proceeding, placed the two children in the custody of Department of Family and Children Services pending a determination of custody. While the court was considering the custody issue, defendant's mother-in-law reported to DFACS her suspicion that defendant had sexually abused one of the children. Following an investigation of the complaint, defendant was indicted for multiple counts of child molestation. Defendant appeals his convictions.

1. At trial, defendant raised the issue that others, including the child's babysitters, had had the opportunity to commit the acts complained of by the child. In closing argument, the prosecuting attorney stated: "I could have called every babysitter that's ever been around that child, and what would they have said? If I asked every one of those babysitters, have you ever touched this child, what would they have said? No? Does that surprise you? Did I have to put them up here to prove that to you?" Defendant's attorney objected on the ground the prosecutor was arguing matters not in evidence, but the objection was overruled. On appeal, defendant argues this portion of the state's closing argument constitutes reversible error.

A prosecutor may not inject in his final argument matters which were not proven in evidence. *Williams v. State*, 254 Ga. 508 (3) (330 SE2d 353) (1985). However, even an improper statement, when taken in context, may not constitute reversible error. *Smith v. State*, 141 Ga. App. 529 (2) (233 SE2d 841) (1977). A review of the transcript shows the objectionable statement concerning the expected testimony of witnesses not actually called to testify was made in context of explaining to the jury why such witnesses were not called. The prosecuting attorney went on to state: "I could have brought every man that has ever been around this child in here, and what would you

expect them to say if they were asked [whether they had touched the child] . . . ." When considered in the context of the entire closing argument, it is obvious that the prosecuting attorney was not stating as a fact what the unpresented testimony would have been but was posing a rhetorical question to the jury as to whether they would have expected any given witness to admit they had molested the child. We find no reversible error in this portion of the closing argument.

Defendant also argues the prosecuting attorney improperly questioned the defendant's failure to call his wife as a witness. Defendant maintains such argument constitutes reversible error because the defendant could not compel his wife to testify. In fact, spousal immunity does not apply to proceedings in which one spouse is charged with a crime against a minor child. OCGA § 24-9-23(b). Thus, defendant's wife could have been compelled to testify and we find no reversible error in the state's remarks on defendant's failure to call her as a witness.

Defendant also argues the prosecuting attorney committed reversible error in appealing to the passions or prejudices of the jury by asking the jury to convict defendant in order to protect the victim from further harm. The prosecuting attorney may make a rhetorical argument about what acts the defendant could be expected to commit in the future so long as it is a reasonable deduction from the evidence. See *Brand v. Wafford*, 230 Ga. 750 (9) (199 SE2d 231) (1973); *Davis v. State*, 178 Ga. App. 357 (3) (343 SE2d 140) (1986). The record shows the prosecuting attorney repeatedly stated that if they did not believe the evidence against defendant, the jury should acquit him. However, if the jury believed the defendant was guilty, the attorney asked them not to "put [the victim] back into this trap . . . ." We find no error in the closing argument.

2. Prior to the trial of the case, defendant challenged the constitutionality of the Child Hearsay Statute, OCGA § 24-3-16. The Georgia Supreme Court granted interlocutory review of this issue and, in *Sosebee v. State*, 257 Ga. 298 (357 SE2d 562) (1987), upheld the constitutionality of the statute by holding that where the statute is implemented it must be accompanied by the right of either party to examine or cross-examine the child witness by requesting the court to call the child as a witness. On appeal of the guilty verdict, defen-

dant again challenges the constitutionality of the statute, arguing that its constitutionality should be reconsidered in light of the more recent prouncement of the United States Supreme Court in *Coy v. Iowa*, 487 U.S. __ (108 SC 2798, 101 LE2d 857) (1988). We find no merit to defendant's argument and therefore are not required to transfer the appeal to the supreme court pursuant to Rule 21(b) of the Rules of the Court of Appeals of Georgia.

3. Defendant argues his constitutional rights pursuant to the Sixth Amendment Confrontation Clause were violated by the court's denial of his motion to compel access to the witness and examination of the child's medical records. The state may not deny defendant access to a witness material to the defense, but a witness can not be compelled to submit to a pre-trial interview. See *Rutledge v. State*, 245 Ga. 768 (2) (267 SE2d 199) (1980); *Emmett v. State*, 232 Ga. 110 (2a) (205 SE2d 231) (1974). The child witness in this case was in the custody of the state acting through DFACS. In an effort to eliminate the conflict of interest between the state as prosecutor and the state's role in supervising the child, the court appointed a guardian ad litem to represent the legal interests of the child. The guardian refused to make the child available to defendant and refused to consent to the release of confidential medical records. "A witness may refuse to be interviewed prior to trial [cit.]; and when the witness is a child, the child's guardian may make this decision." *Dover v. State*, 250 Ga. 209, 211-212 (296 SE2d 710) (1982), *cert. denied*, 459 U.S. 1221 (1983).

Defendant's constitutional argument has been decided adversely to him by the United States Supreme Court. In *Pennsylvania v. Ritchie*, 480 U.S. 39 (__SC__, __LE2d__) (1987), the criminal defendant, charged with sexual child abuse, similarly argued that by denying him access to information necessary to prepare his defense, the trial court interfered with his right of "effective" cross-examination of witnesses. The United States Supreme Court rejected this argument. "If we were to accept this broad interpretation . . . the effect would be to transform the Confrontation Clause into a constitutionally-compelled rule of pretrial discovery. Nothing in the case law supports such a view. The opinions of this Court show that the right to confrontation is a *trial* right. . . . In short, the Confrontation Clause only

guarantees 'an *opportunity* for effective cross-examination, not 'cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' [citing *Delaware v. Fensterer*, 474 U.S. 15, 20 (106 SC 292, 88 LE2d 15) (1985)]." *Pennsylvania v. Ritchie* at 52-53. According to *Pennsylvania v. Ritchie*, the defendant is entitled to an in camera inspection by the trial judge to determine what, if any, material information should be released as useful to the defense. The record of the case now before us shows the court conducted such an inspection in response to defendant's request.

Defendant also maintains he was denied the right of effective cross-examination by the court's denial of his motion for an independent psychiatric evaluation of the child to determine her competence at the time her out-of-court statements were made. The statutory test for determining the competency of a child to testify as a witness in a judicial proceeding is that he understand the nature of an oath. OCGA § 24-9-5. See generally *Smith v. State*, 247 Ga. 511 (277 SE2d 53) (1981). Therefore, the concept of "competency" at the time an out-of-court statement was made is meaningless and irrelevant. OCGA § 24-9-7 contemplates only that a small child be found competent to testify at trial; the code section has no applicability to out-of-court statements and does not require that the court determine the child's competency at the time the out-of-court statements were made. *Newberry v. State*, 184 Ga. App. 356 (4) (361 SE2d 499) (1987). Thus, defendant had no right, at the competency hearing, to present evidence concerning the child's competency at the time the out-of-court statements were made.

Defendant also argues he was denied a sufficient opportunity to contest the indicia of reliability as to the out-of-court statements of the child. The record shows defendant conducted extensive cross-examination of the witness who testified concerning the out-of-court statements during a hearing on reliability outside the presence of the jury. Under the circumstances of this case, we find no requirement for expert testimony to establish the reliability of the child's out-of-court statements. Cf. *Godfrey v. State*, 258 Ga. 28 (9365 SE2d 93) (1988) (in which the out of court statements consisted of "sleep talk", which the court held to be a phenomenon requiring expert testimony to establish its reliability).

4. Defendant had no constitutional right to examine all materials in the file maintained on this case by DFACS. The record reflects that the trial court inspected the DFACS file on several occasions in response to defendant's motion to examine the records. Thus, defendant's right to obtain material information from the state's files was protected. See *Pennsylvania v. Ritchie*, supra.

5. Defendant argues the trial court erred in failing to require the state to produce "all" scientific reports gathered in the case. The state is not required to disclose all reports but, upon a proper written request, the state is required to disclose those scientific reports which will be used as evidence at trial. OCGA § 17-7-211. Defendant does not identify which reports were improperly admitted pursuant to said code section and our review of the record reveals no improperly admitted scientific evidence.

6. An investigator employed by the Fayette County Juvenile Court testified that she observed the child victim in a waiting room of the DFACS offices saying to her father, who was visiting her there, "I won't tell [the DFACS officer] our special secret." Defendant objected to the statement as inadmissible hearsay. "A witness may testify as to what he saw and heard in the defendant's presence." *Moore v. State*, 240 GA. 210, 212 (240 SE2d 68) (1977); accord *Broome v. State*, 141 Ga. App. 538 (2) (233 SE2d 833) (1977). Defendant argues the overheard statement would not be admissible as an exception to hearsay because the witness stated she was not in the room with the child and defendant but observed them and heard the statement through an open doorway. The necessary element for this exception is that the out-of-court statement was made in defendant's presence. See *Green v. State*, 175 Ga. App. 849 (335 SE2d 4) (1985). The witness need only be in a position to hear what was said in defendant's presence.

7. Defendant argues he was entitled to a continuance in order to secure the attendance of a former DFACS caseworker who was out of state at the time defendant attempted to serve her with a subpoena to appear at trial. A defendant is not entitled to a continuance to secure the attendance of a witness when it was within his power to subpoena the witness but he failed to do so. OCGA § 17-7-192; see *Parrish v. State*, 125 Ga. App. 97 (186 SE2d 541) (1971). Defendant

admits he was aware of the caseworker's involvement in the case at least as early as November 1986. Trial commenced in September 1987. It appears from colloquy on the record that no effort was made to subpoena the case worker until after trial had commenced. Where defendant could have served a subpoena on a witness at an earlier date but failed to do so, the court does not err in denying a continuance because at the time of trial the witness was outside the subpoena power of the court. *Coker v. State*, 87 Ga. App. 411 (1) (74 SE2d 12) (1953).

8. Defendant argues the court erred in excluding the testimony of a witness that she had been told by a friend of the child's mother, at the child custody hearing prior to the report of child molestation, "It's not over yet, we've got our bag of tricks." Hearsay evidence is admitted only from necessity. OCGA § 24-3-1(b). In ruling to exclude the testimony, the trial court noted that the declarant of the out-of-court statement had been present at trial and was obviously available to testify. We agree that the statement was not admissible to impeach an earlier witness who had denied hearing the statement because the witness offering the hearsay testimony admitted she did not know if the other witness had heard the statement. We find no error in excluding the hearsay testimony.

9. Prior to trial, the prosecuting attorney revealed, in response to defendant's *Brady* motion, that the child witness had recanted her earlier statements against defendant. Defendant argues the court improperly denied his motion to disqualify the prosecuting attorney because he would be called as a witness at trial. First, the prosecuting attorney's testimony was not necessary to establish that the child had recanted her statements since the attorney identified two other persons who witnessed the recantation. Secondly, although the prosecuting attorney was subpoenaed as a witness, he was never called to testify. Thus, the court was not required, nor was it necessary, to disqualify the prosecuting attorney.

10. Finally, a review of the record shows sufficient evidence was presented to enable a rational trier of fact to find defendant guilty beyond a reasonable doubt of the crimes charged.

Judgment affirmed. McMurray, P. J., and Benham, J., concur.

Appendix B

Order of Georgia Court of Appeals Upon Motion for Reconsideration

Court of Appeals
of the State of Georgia

Atlanta, March 14, 1989

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

77282. GEARY ALAN SOSEBEE v. THE STATE

Upon consideration of the motion for rehearing filed on behalf of appellant in the above styled case, it is hereby ordered that new page 2 attached hereto be substituted for old page 2 of the original opinion dated February 2, 1989. Motion for rehearing is hereby denied.

commit the acts complained of by the child. In closing argument, the prosecuting attorney stated: "I could have called every babysitter that's ever been around that child, and what would they have said? If I asked every one of those babysitters, have you ever touched this child, what would they have said? No. Does that surprise you? Did I have to put them up here to prove that to you?" Defendant's attorney objected on the ground the prosecutor was arguing matters not in evidence, but the objection was overruled. On appeal, defendant argues this portion of the state's closing argument constitutes reversible error.

A prosecutor may not inject in his final argument matters which were not proven in evidence. *Williams v. State*, 254 Ga. 508 (3) (330 SE2d 353) (1985). However, even an improper statement, when taken in context, may not constitute reversible error. *Smith v. State*, 141 Ga. App. 529 (2) (233 SE2d 841) (1977). A review of the transcript shows the objectionable statement concerning the expected testimony of witnesses not actually called to testify was made in the context of explaining to the jury why such witnesses were not called. The prosecuting attorney went on to state: "I could have

Appendix C

Order of the Georgia Supreme Court Denying Application for a Writ of Certiorari

Clerk's Office, Supreme Court of Georgia

ATLANTA, April 19, 1989

Case No. 46869, Geary Alan Sosebee v. The State

C/A #77282

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur, except Smith, J. dissents.

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

Appendix D

Order of the Georgia Supreme Court Denying Motion for Rehearing

Clerk's Office, Supreme Court of Georgia

ATLANTA, May 03, 1989

The motion for a rehearing was denied today:

Case No. 46869, Sosebee v. The State

Bell, J. dissents.

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

Appendix E

Notice to the Georgia Court of Appeals of Intention to Seek a Writ of Certiorari

In the Court of Appeals State of Georgia

GEARY ALAN SOSEBEE,	)	
Applicant for Certiorari,	)	
	)	COURT OF APPEALS
	)	NO. 77282
v.	)	
	)	SUPREME COURT
THE STATE,	)	NO. 46869
Respondent.	)	

NOTICE OF INTENT

TO PETITION FOR CERTIORARI

The applicant, Geary Alan Sosebee (hereinafter referred to as applicant or Sosebee), by and through his undersigned counsel, pursuant to Court of Appeals Rule 16(b) respectfully gives this Court notice of his intention to petition to the United States Supreme Court for the writ of certiorari.

Respectfully submitted,

BOBBY LEE COOK
Attorney for the Applicant
P. O. Box 370
Summerville, GA 30747
(404) 857-3421

JAKE ARBES
Attorney for the Applicant
233 Mitchell Street
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Appendix F

Order of the United States Supreme Court Granting Extension of Time in Which to File Petition for Certiorari

Supreme Court of the United States

No. A-999

Geary Alan Sosebee,
Petitioner

v.

Georgia

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including August 1, 1989.

/s/ Anthony M. Kennedy
Associate Justice of the Supreme
Court of the United States

Dated this 19th
day of June, 1989.

Appendix G

Opinion of the Georgia Supreme Court In *Sosebee I* on Interlocutory Appeal

Docket No. 44131

STATE OF GEORGIA,
Appellee,

v.

GEARY ALAN SOSEBEE,
Appellant.

Before:
BELL, Justice:

The Appellant, Geary Alan Sosebee, was indicted on charges of sexually abusing his five-year-old daughter.[1] He moved in limine to exclude incriminating hearsay statements which had been made by his daughter, but the trial court denied his motion. We granted Sosebee's interlocutory application. On appeal, the issue is whether the Child Hearsay Statute, OCGA § 24-3-16 (eff. July 1, 1986), which allows the state to use a child's out-of-court statements without requiring the state to call the child as a witness, unconstitutionally infringes upon a defendant's Sixth Amendment right to confront witnesses.

OCGA § 24-3-16 provides that "[a] statement made by a child under the age of 14 years describing any act of sexual contact or

---

[1] The state alleges that the appellant committed the crimes for which he has been indicted between September 1, 1985, and April 12, 1986. Three indictments were returned on September 9, 1986. They charge appellant with one count of child molestation; two counts of aggravated sodomy; one count of rape; and one count of incest. Appellant filed his motion in limine on September 22, 1986. The motion was heard on October 16, 1986, and was denied on October 17. On October 17 the superior court granted a certificate of immediate review, and on November 4, 1986, we granted the application for interlocutory review. On November 12, 1986, appellant filed his notice of appeal, and on December 2 the record was docketed in this court. The appeal was orally argued on February 9, 1987.

physical abuse performed with or on the child by another is admissible in evidence by the testimony of the person or persons to whom made if the child is available to testify in the proceedings and the court finds that the circumstances of the statement provide sufficient indicia of reliability." By its terms, this statute allows the prosecution to satisfy its burden of proof under certain circumstances by introducing the alleged victim's hearsay declarations without putting the victim on the stand. The statute does not, however, specify all the implications of the phrase, "if the child is available to testify in the proceedings." More particularly, it is unclear whether the legislature intended to require *the defendant* to call the child as a defense witness in order to exercise his right of confrontation. We think it is unlikely that this was the legislative intent, since it is possible that jurors could resent the defendant for forcing the child to take the stand and undergo cross-examination. Absent a clear directive from the legislature, we are reluctant to require the defendant to bear this onus, especially since a reasonable alternative construction of the statute exists.

We therefore hold that if the prosecution invokes the Child Hearsay Statute to introduce out-of-court declarations by the alleged victim, the court shall do as follows: Before the state rests, the court shall, at the request of either party, cause the alleged victim to take the stand. The court shall then inform the jury that it is the court who has called the child as a witness, and that both parties have the opportunity to examine the child. The court shall then allow both parties to examine and cross-examine the child as though the Child Hearsay Statute has not been invoked.

Our construction of § 24-3-16 moots the appellant's constitutional arguments. Accordingly, we find that the trial court correctly denied the motion in limine. On remand, the court is directed to conduct the trial in a manner consistent with OCGA § 24-3-16, as interpreted by this court.

Judgment affirmed with directions. All the Justices concur, except Marshall, C.J., who dissents.

DECIDED JUNE 19, 1987 —

RECONSIDERATION DENIED JULY 19, 1987.

Interlocutory appeal. Fayette Superior Court. Before Judge Miller.

Austin E. Catts, Robert G. Rubin, for appellant.

Johnnie L. Caldwell, Jr., District Attorney, J. David Fowler, J. Thomas Morgan, Assistant District Attorneys, for appellee.

Appendix H

Other States' Child Hearsay Statutes

Arizona

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement. *Ariz. Rev. Stat. Ann.* § 13-416.B (Supp.1988)

Arkansas

2. The proponent of the statement shall give to the adverse party reasonable notice of his intention to offer the statement and the particulars of the statement. *Ark. Rules of Evid.* Rule 803(25)(A) 2 (1988)

Florida

In a criminal action, the defendant shall be notified no later than 10 days before trial that a statement which qualifies as a hearsay exception pursuant to this subsection will be offered as evidence at trial. The notice shall include a written statement of the content of the Child's statement, the time at which the statement was made, the circumstances surrounding the statement which indicate its reliability, and such other particulars as necessary to provide full disclosure of the statement. *Fla. Stat. Ann.* § 90.803 (23)(b)(West Supp. 1989) (effective July 1, 1985)

Idaho

Statements may not be admitted unless the proponent of the statements notifies the adverse party of his intention to offer the statements and the particulars of the statements sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statements. *Idaho Code* § 19-3024 2 (1987)

Indiana

(e) A statement or videotape may not be admitted in evidence under this section unless the prosecuting attorney informs the defendant and the defendant's attorney of:

(1) His intention to introduce the statement or videotape in evidence; and

(2) The content of the statement or videotape; within a time that will give the defendant a fair opportunity to prepare a response to the statement or videotape before the trial. 35-4-6 (e) *Ind. Code Ann.* § 35-37-4-6(2)(e)(Burns Supp. 1988)

Maryland

(3) In order to provide the defendant with an opportunity to prepare a response to the statement, the prosecutor shall give to the defendant and the defendant's attorney, at least 20 days before the criminal proceeding in which the statement is to be offered into evidence, notice of: (i) The prosecution's intention to introduce the statement; and, (ii) The content of the Statement. *Md. Cts. & Jud. Proc. Code Ann.* § 9-103.1 (c)(3) (Supp. 1988) (effective July 1, 1988)

Minnesota

The proponent of the statement notifies the adverse party of the proponent's intention to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence to provide the adverse party with a fair opportunity to prepare to meet the statement. *Minn. Stat. Ann.* § 595.02 Subd. 3 (c) (West Supp. 1989)

Missouri

A statement may not be admitted under this section unless the prosecuting attorney makes known to the accused or his counsel his intention to offer the statement and the particulars of the statement suffi-

ciently in advance of the proceedings to provide the accused or his counsel with a fair opportunity to prepare to meet the statement. *Mo. Ann. Stat.* § 491.075 3 (Vernon Supp. 1989)

Oklahoma

B. A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement at least ten (10) days in advance of the proceedings to provide the adverse party with an opportunity to prepare to answer the statement. *Okla. Stat. Ann.* 12, § 2803.1 B (Supp. 1989)

South Carolina*

(C) The proponent of the statement shall inform the adverse party of the proponent's intention to offer the statement and the content of the statement sufficiently in advance of the proceeding to provide the defendant with a fair opportunity to prepare a response to the statement before the proceeding at which it is offered. *S.C. Code Ann.* § 19-1-180 (C) (Law. Co-op. 1988)

South Dakota

No statement may be admitted under this section unless the proponent of the statement makes known his intention to offer the statement and the particulars of it, including the name and address of the declarant to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement. *S.D. Codified Laws Ann.* § 19-16-38 (1987)

---

* South Carolina's additional prohibition against *any* use of child hearsay statements arising in the context of divorce proceedings is discussed at page 26, infra.

Texas

(1) On or before the 14th day before the date the proceeding begins, the party intending to offer the statement:

(A) Notifies the adverse party of its intention to do so;

(B) Provides the adverse party with the name of the witness through whom it intends to offer the statement; and,

(C) Provides the adverse party with a written summary of the statement. *Tex. Code Crim. Proc. Ann.* art. 38.08 (1) (Vernon Supp. 1989)

Utah

(3) A statement admitted under this section shall be made available to the adverse party sufficiently in advance of the trial or proceeding, to provide him with an opportunity to prepare to meet it. *Utah Code Ann.* §76-5-411 (3) (Supp. 1988)

Virginia

C. A statement may not be admitted under this section unless the proponent of the statement notifies the adverse party of his intention to offer the statement and the substance of the statement sufficiently in advance of the proceedings to provide the adverse party with a reasonable opportunity to prepare to meet the statement, including the opportunity to subpoena witnesses. *Va. Code Ann.* § 63.1-248.13:2 C (Supp. 1988)

Washington

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement. *Wash. Rev. Code* § 9A.120 (1988)

No. 89-170

In The

Supreme Court of the United States

October Term, 1989

GEARY ALAN SOSEBEE,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Georgia

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Should this Court grant certiorari to consider alleged confrontation violations under the Georgia child hearsay statute where the child is available at trial and the reliability of the child's statements are established prior to their admission?

II.

Should this Court grant certiorari to consider a federal question not properly raised below?

III.

Should this Court consider an alleged confrontation abridgement where Petitioner declined to have the trial court call the child victim to testify?

IV.

Should this Court grant review to consider an alleged conflict among state statutes on nonconstitutional matters?

V.

Should this Court grant certiorari to consider an issue of public policy falling within the legislative realm?

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No. 89-170

In The

Supreme Court of the United States

October Term, 1989

GEARY ALAN SOSEBEE,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Georgia

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

Petitioner, Geary Alan Sosebee, was indicted by the Fayette County, Georgia, Grand Jury on September 9, 1986, under 3 separate indictments involving sexual abuse upon his 5 year old daughter, Holly Sosebee. (R. 18-23; 24). Specifically, indictment number 86R-224 charged Petitioner with one count of child molestation and one count of aggravated assault upon Holly Sosebee on April 12, 1986. Indictment number 86R-225 charged

Petitioner with one count of aggravated child molestation, one count of aggravated sodomy, and one count of rape upon Holly Sosebee between the period September 1, 1985 – April 12, 1986. Indictment number 86R-226 charged Petitioner with one count of incest upon his daughter Holly Sosebee during the period September 1, 1985 – April 12, 1986.

On September 22, 1986, Petitioner filed a pre-trial motion in limine, seeking to bar the state from eliciting from state witnesses under O.C.G.A. § 24-3-16 any statements made by the victim describing the sexual acts. (R. 70). The constitutional challenge to this statute was denied by the trial court on October 17, 1986. (R. 83). Petitioner successfully sought an interlocutory review of this decision, with the Georgia Supreme Court granting the application for such an appeal on November 4, 1986. (R. 96).

On June 19, 1987, the Supreme Court of Georgia adopted a construction of this statute, requiring that before the completion of the state's evidence, the trial court shall, at the request of either party, call the child-victim to the stand, inform the jury that the court was calling the victim, and then permit examination of the victim. *Sosebee v. State*, 257 Ga. 298, 357 S.E.2d 562 (1987). The court further held that the construction given the statute mooted any constitutional argument. *Id.* Rehearing was denied July 29, 1987.

Upon a jury trial on September 21 – October 6, 1987, the jury found the Petitioner guilty on all counts under all three indictments. (R. 235-38). Under indictment number 86R-224, Petitioner was sentenced to twenty years to

serve for child molestation and to a consecutive twenty year sentence for aggravated sodomy. (R2-39). Under indictment number 86R-225, Petitioner was sentenced to concurrent twenty year sentences on the counts of aggravated child molestation and aggravated sodomy and a consecutive twenty year sentence for rape to follow the sentences under the first indictment. (R. 240). Under indictment number 86R-226, Petitioner was sentenced to a concurrent twenty year sentence for incest. (R. 2-41).

On direct appeal, the Petitioner reasserted his constitutional challenge to O.C.G.A. § 24-3-16 as well as additional errors. The Georgia Court of Appeals found these allegations to be without merit and affirmed the Petitioner's convictions and sentences on February 2, 1989. *Sosebee v. State*, 190 Ga. App. 746, ___ S.E.2d ___ (1989). The opinion was amended when the motion for rehearing was simultaneously denied on July 29, 1987. The Georgia Supreme Court subsequently denied certiorari.

A review of the facts presented at the Petitioner's trial is necessary for this Court's determination of whether this petition should be granted. Therefore, a summary of the evidence submitted at the Petitioner's trial is presented as follows.

On April 12, 1986, Petitioner and his wife appeared at a divorce hearing concerning temporary custody of their two children. (Trial transcript 1462) (hereinafter designated "T."). The presiding judge ordered that the children be temporarily placed in the custody of the Fayette County, Georgia, Department of Family and Children Services, (hereinafter referred to as DFACS). (T. 1466-67). After the hearing, the children's mother, Leslie Sosebee,

and two of her friends picked up the children from the babysitter and took them immediately to DFACS. (T. 1731). No one said anything to the children about Petitioner. (T. 1732).

On April 16, 1986, Fayette County Sheriff Juvenile Investigator Opal McRaney met with the Petitioner's five-year old daughter, Holly Sosebee, at the request of DFACS child protection services worker Angela Stinchcomb regarding possible sexual abuse. (T. 321-22). Ms. McRaney had been an investigator for over nine years and had received special training in investigating child abuse and sex crimes. (T. 323-24). Following a hearing outside the presence of the jury (T. 332-81), the investigator then testified as to the substance of the interview. The investigator testified that upon her initial arrival at the department, she overhead Holly tell the Petitioner that she would not tell the DFACS worker their special secret. (T. 385). In the subsequent interview, Holly indicated that she liked her father and that she was "his special girl," while describing her mother as evil. (T. 389). The child agreed to discuss her special secret if the DFACS worker would leave the room. (T. 390). The child then related that her secret was a nasty secret involving a monster wearing an ugly mask and making her bottom hurt; the monster would not do anything to her sister because the monster did not like the sister. (T. 391-92). The child then identified the Petitioner as the monster and described how the Petitioner touched her vaginal area with his hand and put his tongue in her mouth. (T. 393). Using anatomically correct dolls, the child demonstrated how the Petitioner would put his face in her genital area and later placed the doll she had identified as her father upon the doll she

identified as herself and simulated up and down movements. (T. 398). Throughout this interview, the investigator observed the child rubbing herself occasionally between her legs; when asked why, the child responded that it was nasty and felt good. (T. 399).

In a second interview several days later, Holly told the investigator that three other men, along with her father, had done sexual things to her, describing how her father went first, how she had been picked up and placed on his "peed." (T. 403-404). The child told the investigator that pictures were made of her as the men took turns doing this. *Id.*

The child's pediatrician, Dr. Joel Goldstein, examined Holly on April 17, 1986. (T. 830). The pediatrician had last seen Holly on March 6, 1986, and a general vaginal examination indicated it to be in a normal condition for a five-year old. (T. 833-34). However, on April 17, the child's vagina visibly appeared different, with the size of the vaginal opening resembling that of an adult women more than that of a child. (T. 832). The pediatrician then referred the child to an obstetrician/gynecologist, Dr. Darrell Martin. (T. 832).

The gynecologist, assisted by nurse/midwife Terry Gillenwaters, examined Holly. (T. 487). To obtain a vaginal culture, the nurse used a speculum normally used on females teenaged or older; ordinarily, the nurse would have used a Q-tip on a child of Holly's age to obtain such a culture. (T. 487; 461-62). The child's vaginal opening was two to three centimeters in size, approximately the width of one and one-half fingers, and the hymen was not intact. (T. 463). The child had a vaginal infection,

hemophilus, which is generally associated with sexual abuse in pre-pubertal girls. (T. 465-66; 494). The gynecologist pointed out that it was not uncommon for a man to transmit this infection while exhibiting no symptoms himself. (T. 494).

The gynecologist also examined the child one month later at a hospital while she was anesthetized. (T. 491-92). Holly's vaginal opening measured 1.7 by 1.7 by 1.8 centimeters, closer to the size of a teenaged or older female as the average size of a vaginal opening for an eight-year old girl was under five millimeters or one-half centimeter. (T. 491-93).

The pediatrician testified that hemophilus is rarely found in non-sexually active children and usually found in sexually-active adult women. (T. 830-36). A finding of hemophilus in a small child generally indicates penile transmittal, and a combination of the hemophilus bacteria and stretching of the vagina as seen in Holly indicated some "ongoing sexual activity involving penile insertion in the child." (T. 836-37).

In June 1986, clinical psychologist James Stark interviewed Holly twice. (T. 964). The child appeared to be traumatized by something having to do with her father. (T. 988). The psychologist also observed numerous behavioral problems generally associated with child sexual abuse. (T. 987-94). Following a hearing outside the presence of the jury (T. 599-611), the psychologist related the child's description of sexual acts between Holly and her father, including oral-anal acts, oral-vaginal acts, sexual intercourse, kissing in which her father put her tongue in her mouth, and the father putting his mouth on her

breasts and touching her vagina with his hand. (T. 995, 997-98). The child stated that she had been told by her father not to tell because if she told, he might get in trouble. (T. 998). The child also described a group sex scene involving her father and three other men taking turns having intercourse and various forms of oral sodomy with the child. (T. 1001-1005).

The psychologist referred Holly to Nancy Copeland Aldridge, a psychotherapist and licensed clinical social worker, for additional evaluation and therapy. (T. 615, 622-23). The psychotherapist had approximately 46 sessions with the child. (T. 626). The child disclosed that she had secrets and that she would die if she told them and would not see Jesus. (T. 627). The child later described the secrets as involving her father touching her anus with his tongue and her vagina with his tongue, his hand and his penis. (T. 635-36). Petitioner would kiss her on the mouth, put his tongue in her mouth, and put his penis in her vagina which the child claimed hurt. (T. 638-40). The child indicated that the father would put something sticky on his penis and that something would come out of it when he put it in her vagina. (T. 639). Holly indicated that these incidents occurred in her father's bedroom about once a week and that she had been told by her father not to tell. (T. 639). Holly described these events as occurring in their new house, both when her parents lived together and after her father moved out. *Id.* The child also described a group sex incident involving her father and three other men named Don, Scott, and Michael, during which the child said she had been made to drink something which made her sleepy and that movies were made of what they did. (T. 648-49). On January 3,

1987, Holly denied that her father or anyone else had ever bothered her or sexually abused her. (T. 654-58). The child then began to fluctuate as to what happened and her memory faded as to details. *Id.* Finally, on May 6, 1987, the child would only tell the psychotherapist that her father did bad things to her but that she could not remember what they were. (T. 658). The psychotherapist concluded that Holly exhibited many of the general behavorial indicators associated with the child abuse syndrome and that Holly fitted into the syndrome, including the recantation. (T. 664, 687).

In his defense, Petitioner presented a neighbor who had seen the child left with babysitters (T. 1095); Donald Evans who had been accused by the child of molesting her (T. 1115); two individuals in an attempt to impeach the juvenile investigator (T. 1153, 1179); a psychiatrist who examined the Petitioner and concluded that he was not a pedophile (T. 1202); two good character witnesses (T. 1331, 1337); a gynecologist who treated Petitioner's wife for vaginitis and discussed how certain infections could be transmitted through non-sexual activity (T. 1345); a urologist who treated the Petitioner and found no sexually transmitted disease (T. 1361); a clinical psychologist who had dealt with ten sex offenders and opined that the Petitioner did not fit their criteria (T. 1523); a clinical psychologist who conducted a penile plethysmograph and concluded the Petitioner did not appear to be a pedophile (T. 1578); two witnesses in an attempt to impeach the credibility of the DFACS worker (T. 1620; 1718); a day care sitter describing one incident in which the child refused to leave with a particular babysitter (T. 1661); and two witnesses who stated that the juvenile

investigator had a bad reputation. (T. 1722; 1725). Petitioner also testified in his defense, denied the accusations, and described how his daughter had sexually abused herself. (T. 1376).

The jury found the Petitioner guilty on all counts. (T. 1905-1906).

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE GEORGIA CHILD HEARSAY STATUTE DOES NOT VIOLATE THE RIGHT TO CONFRONTATION.

Petitioner contends that the Georgia Child Hearsay Statute is unconstitutional, contending that it allegedly denies a defendant the opportunity for "face-to-face" confrontation, despite the requirement that the declarant/child be available at the trial. Petitioner also contends that the statute does not permit "effective" cross-examination of the child and also complains of the lack of contemporaneous cross-examination when the child made statements, such as in this case for purposes of investigation, evaluation and treatment. Respondent submits that the construction adopted by the Georgia Supreme Court, and as applied in this case, does not violate the right to confrontation as the statute requires the child/declarant to be available at trial and that indicia of reliability of the child's statements be shown prior to their admission so that this allegation provides no basis for the grant of certiorari.

In 1986, the Georgia Legislature enacted the following statute, effective July 1, 1986:

> A statement made by a child under the age of 14 years describing any act of sexual contact or physical abuse performed with or on the child by another is admissible in evidence by the testimony of the person or persons to whom made if the child is available to testify in the proceedings and the court finds that the circumstances of the statement provide sufficient indicia of reliability.

O.C.G.A. § 24-3-16. Petitioner challenged the constitutionality of this statute on an interlocutory appeal. The Georgia Supreme Court construed the term "if the child is available to testify in the proceedings" as requiring the child to be present and requiring the trial court to call the child as the court's witness if either party asks. *Sosebee,* 257 Ga. at 299. By having the trial court call the child as a witness, any potential adverse implication arising to the defendant by calling the child is avoided. *Id.*

Here, the trial court conducted hearings outside the presence of the jury to establish the indicia of reliability of the child's statements to juvenile investigator McCraney (T. 332-81); to psychotherapist Aldridge (T. 518-97); and to clinical psychologist Stark (T. 599-611), prior to the admission of the child's statements to these three individuals. The trial court found as fact that the child was available to testify. (T. 379). Relying upon *Dutton v. Evans,* 400 U.S. 74 (1970), the trial court then found that the statements of the 5 year old victim had sufficient indicia of reliability to warrant their admission. (T. 378-81; 596-97; 611). Specifically, following the hearing on the statements to juvenile investigator McCraney, the

trial court ruled that the child was met by the investigator who was in sheriff's uniform, and that the child's verbal and non-verbal statements through the use of dolls "covers a subject matter that a 5 or 6-year old child would not know, the sexual nature not being information that a child of that age would have." (T. 380-81). The court further found that the statements of the victim were "the type of story that a child of this age would not make up even if she had knowledge of these sexual matters." *Id.* The court based these findings on the fact that the child of that age was in a strange building for the first time, in the company of an unknown lady who was in uniform. *Id.* The court found these facts evidenced reliability of the statements.

Similarly, as to psychotherapist Aldridge, the trial court relied in part upon its earlier rulings and noted that a child of that age was not "ordinarily mentally capable of making up" such details. (T. 596-97). The court also found that the demeanor of the psychotherapist convinced the judge that words had not been put in the victim's mouth. (T. 596-97). As to the clinical psychologist, the trial court relied in part upon the two previous rulings and found sufficient indicia of reliability. (T. 611). In addition, the trial court conducted an in camera inspection of the files of the psychotherapist and investigator (T. 597, 611) and gave any exculpatory evidence to Petitioner. The trial court also conducted an in camera inspection of the DFACS file and gave Petitioner the *Brady v. Maryland*, 373 U.S. 83 (1985), material. (T. 5). Further, after the prosecutor informed Petitioner under *Brady* on the first day of trial that the child had recanted

all her statements in a meeting the previous week with the prosecutor (T. 42), the trial court granted Petitioner's request for adjournment for the afternoon so that Petitioner could follow up on this information. (T. 44). Neither the prosecutor nor Petitioner asked that the child be called as a witness. (T. 1050; 1085-88).

Under these facts, Respondent submits that no violation of the right to confrontation has been shown. Petitioner contends that the statute is unconstitutional because it permits the statement of the child to be utilized even though the child is available. Petitioner claims such out-of-court declarations cannot *per se* be utilized unless the unavailability of the declarant is established. This Court has previously rejected such assertions. *Dutton v. Evans; California v. Green*, 399 U.S. 149 (1970) (prior inconsistent statements admitted as substantive evidence where declarant available at trial). Further, the confrontation clause is satisfied by the "opportunity" for cross-examination, not cross-examination "effective" in whatever way and to whatever extent a defendant might wish. *United States v. Owens*, ___ U.S. ___, 108 S.Ct. 838 (1988); *Pennsylvania v. Ritchie*, ___ U.S. ___, 107 S.Ct. 989 (1987); *Delaware v. Fensterer*, 474 U.S. 15 (1985) (*per curiam*). Finally, as this Court recently noted, confrontation is a trial right. *Ritchie*, 107 S.Ct. at 999. This Court has also declined to require contemporaneous cross-examination as a constitutional matter, noting that an inability to cross-examine a witness at the time a prior statement was made is not of crucial significance where the defendant is assured of cross-examination at trial. *California v. Green*, 399 U.S. at 158.

Here, Petitioner had the opportunity to cross-examine the child/declarant but declined to do so. Further, the reliability of any statements the declarant made out of court were established prior to their admission. Petitioner was further given wide latitude in conducting full and sifting cross-examinations of these three individuals as to what they had heard, including inquiry before the jury as to the potential for their having influenced the statements of the child. (T. 407-54; 694-798, 816-827; 1005-1080). The trial court also permitted Petitioner to attack the credibility of the DFACS worker although this individual was not present and did not testify at trial about her interviews with the child. (T. 1695-96). Respondent submits that the jury had a sufficient basis for evaluating the truth of any prior statement of the child so that the objectives of the confrontation clause were achieved in this case. Accordingly, Respondent submits that this Court should decline to grant certiorari to consider questions previously resolved by this Court.

II. THIS COURT SHOULD DECLINE TO CONSIDER A FEDERAL QUESTION NOT PROPERLY RAISED BELOW.

Petitioner contends before this Court that the construction given by the Georgia Supreme Court of one phrase of the child hearsay statute, as discussed above, violates the separation of powers doctrine. This question was not raised in the motion for rehearing in the interlocutory appeal in the Georgia Supreme Court or as error on direct appeal to the Georgia Court of Appeals following trial. Instead, Petitioner raised this issue for the first time in the certiorari petition to the Georgia Supreme

Court after trial. Thus, this Court should decline to consider a federal question improperly raised and not decided below. *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Accordingly, Respondent submits this Court should decline to grant certiorari upon this basis.

III. PETITIONER WAS NOT DENIED THE OPPORTUNITY TO CROSS-EXAMINE THE CHILD BY THE GEORGIA STATUTE.

Petitioner contends that the statute as applied in this case denied him his constitutional right to "effective" cross-examination and due process. Petitioner urges that many of the rulings of the state courts in this case are erroneous under state law and asks this Court to sit as a "super" appellate court. Respondent submits that this Court's decision to grant certiorari is motivated by many reasons other than the perceived correctness of the judgment below. *Ross v. Moffitt*, 417 U.S. 600 616-17 (1974).

Petitioner complains of the decision of the child's guardian ad litem who denied Petitioner's request prior to trial to interview the child. The Georgia Court of Appeals noted on direct appeal that under Georgia law, the "state may not deny defendant access to a witness material to the defense, but a witness cannot be compelled to submit to a pre-trial interview." *Sosebee*, 190 Ga. App. at 748. The state appellate court further relied upon *Pennsylvania v. Ritchie* regarding Petitioner's assertion that the denial of the request by the guardian ad litem denied him the right to "effective" cross-examination. *Sosebee*, 190 Ga. App. at 748-49. The state appellate court quoted language from *Ritchie* wherein this Court noted

that the confrontation clause was not a pre-trial rule of discovery. *Id.* The court also noted that the trial court had conducted an in camera inspection of the state files for material information as required by *Ritchie.*

The state appellate court also rejected Petitioner's assertion that he was denied an effective opportunity to test the competency of the child. The gist of the Petitioner's argument below was that he precluded from presenting extraneous information regarding the competency of the child *not* at the time of the pre-trial competency hearing but, rather, information allegedly relating to her competency at the time the child made statements to relevant authorities. *Sosebee,* 190 Ga. App. at 749. The state court noted that there was no such requirement under state law, particularly where competency is determined by whether the child understands the nature of the oath and is not tied to any mental state. *Id.* Indeed, Petitioner's argument on this issue before this Court addresses solely the propriety of this holding under state law so that Respondent submits no federal question is presented by this argument.

Finally, contrary to the Petitioner's assertions, Petitioner was given the opportunity to contest the reliability of the child's statements. Petitioner again complains of the lack of pre-trial disclosure of the "entire" DFACS file and the child's medical records. Petitioner ignores the fact that he was given ample opportunity to test these three witnesses on what they had heard. Respondent submits no abridgement of the confrontation clause is presented under these facts.

In conclusion, Respondent submits that no federal question not previously decided by this Court is presented by this allegation. Accordingly, Respondent would urge this Court to decline to grant certiorari for these reasons.

IV. THERE IS NO CONFLICT BETWEEN GEORGIA AND OTHER STATES STATUTES ON ANY FEDERAL QUESTIONS.

In the fourth issue before this Court, the Petitioner contends that the Georgia statute impermissibly conflicts with other state statutes, which, according to the Petitioner, allegedly require pre-trial disclosure by the state of certain materials. Respondent submits that pretermitting the question of any conflict, no federal question is presented by this claim as there is no federal right to general discovery in a criminal case. *Pennsylvania v. Ritchie*, 107 S.Ct. at 003; *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). That a majority of states may follow a particular criminal procedure does not in and of itself present a federal question, nor is a federal question "answered by cataloging the practices of other States." *Martin v. Ohio*, ___ U.S. ___, 107 S.Ct. 1098, 1103 (1987). Petitioner in effect asks this Court to rewrite the Georgia statute to require pre-trial discovery for a defendant. Respondent submits that such a request provides no basis for the granting of certiorari.

V. PETITIONER'S POLICY ARGUMENT PRESENTS NO BASIS FOR THE GRANTING OF CERTIORARI.

In his final issue before this Court, Petitioner contends that evidentiary procedures need to be established to protect parents from allegedly false child abuse allegations in custody battles. Petitioner asks this Court as a matter of public policy to grant certiorari in this case to consider what measures, if any, may be afforded parents in divorce proceedings in the face of allegedly false sexual abuse allegations. Respondent submits that such considerations, regardless of their merit, fail to identify a federal question for review by this Court and are more properly left to legislatures. *McCleskey v. Kemp*, ___ U.S. ___, 107 S.Ct. 1756, 1781 (1987).

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Court of Appeals of Georgia as it is manifest that the federal questions presented to this Court for review were correctly decided under precedent of this Court and that no federal questions not previously decided by this Court are presented.

Respectfully submitted,

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